

The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board.

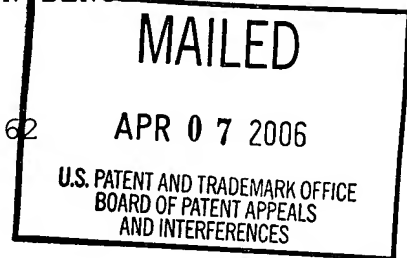
UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DAVID WILLIAM KOEING, ANNASTACIA JANE KISTLER,
JOHN EUGENE PELUSO, MARGARET MURPHY WARD, DOUGLAS BRYAN COLE,
MARK KEVIN MELIUS and SHERRIE LYNN BENCIK

Appeal No. 2006-0609
Application No. 10/036,862

ON BRIEF



Before GARRIS, PAK and TIMM, *Administrative Patent Judges*.

PAK, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on an appeal from the examiner's final rejection of claims 1 through 34, which are all of the claims pending in the above-identified application. We have jurisdiction under 35 U.S.C. § 134.

APPEALED SUBJECT MATTER

Pursuant to 37 CFR § 41.37(c)(1)(vii)(2004), the appellants have provided subheadings identifying the groups of claims argued

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separately on appeal as follows (the Brief, pages 6, 12, 16, 17, and 18):

Subheading A: Claims 1 and 5 through 11;
Subheading B: Claims 2 through 4;
Subheading C: Claims 12 through 22;
Subheading D: Claims 23 through 29; and
Subheading E: Claims 30 through 34.

Therefore, for purposes of this appeal, we select claims 1, 2, 12, 23 and 30 as representative of all of the claims on appeal and determine the propriety of the examiner's Section 103 rejection set forth below based on these claims alone consistent with 37 CFR § 41.37(c)(1)(vii)(2004). Claims 1, 2, 12, 23 and 30 are reproduced below:

1. A method for cleaning soil from an animal body surface, comprising:

instructing a user to wipe an animal body surface with a fresh product at least three times;

wherein at least one fresh product is dry, and at last [sic, least] one fresh product is wet.

2. The method of claim 1, where in the instructing comprises directing the user to wipe the surface with a dry product, followed by wiping the surface with a dry product, followed by wiping the surface with a wet product.

12. A system for facilitating the cleaning of an animal body surface, comprising:

a package comprising a first fresh product; and

instructions to wipe an animal body surface at least three times with a combination of the first fresh product and a second fresh product;

wherein one of the first fresh product or the second fresh product is wet.

23. A package for facilitating the cleaning of an animal body surface comprising:

a dry product comprising a first number of portions;

a wet product comprising a second number of portions; and

instruction to wipe an animal body surface at least three times with a combination of a fresh portion of the dry product and a fresh portion of the wet product.

30. A method for facilitating the cleaning of an animal body surface, comprising:

enclosing in a package a first fresh product selected from the group consisting of a dry product and a wet product; and

offering the package for sale;

wherein the package comprises instructions to wipe the surface at least three times with a combination of the first fresh product and a second fresh product; wherein one of the first fresh product and the second fresh product is wet.

THE PRIOR ART

The sole prior art reference relied upon by the examiner in support of the Section 103 rejection before us is:

Marino

5,950,960

Sep. 14, 1999

THE REJECTION

Claims 1 through 34 stand rejected under 35 U.S.C. § 103 as unpatentable over the disclosure of Marino.

OPINION

We have carefully reviewed the claims, specification and prior art, including all of the arguments advanced by both the examiner and the appellants in support of their respective positions. This review has led us to conclude that the examiner's Section 103 rejection is well founded. Accordingly, we affirm the examiner's decision rejecting claims 1 through 34 under Section 103. Our reasons for this determination follow.

The examiner has found, and the appellants have not disputed, that Marino teaches "an apparatus capable of being sold to the public and further comprising a first and second housing so as to house [,e.g., enclose,] moist wipes (note col. 3, lines 1-35) and . . . a dry roll of tissue/toilet paper (note col. 1, lines 30-60)." Compare the Answer, page 4, with the Brief and the Reply Brief in their entirety, specifically the Brief, pages 18-19. The appellants have not argued that the claimed first and second fresh products in a package do not correspond to the toilet paper and moist wipes in the apparatus taught by Marino. See the Brief and Reply Brief in their entirety. Nor have the

appellants specifically challenged the examiner's "Official Notice as to the 'well known implements of instructional data associated with devices for sale.'"¹ See the Reply Brief, pages 2-4. Rather, the appellants argue that the apparatus or package taught by Marino does not include an instruction (e.g., a printed instruction containing a direction) to wipe an animal body surface at least three times with a combination of the first and second fresh products as required by claims 12, 23 and 30. See, e.g., the Brief, pages 16-19. In other words, it is the appellants' position that the printed content of the instruction sheet would have rendered the claimed package patentably different from the package or apparatus taught by Marino. See the Reply Brief, page 3. In support of this position, the appellants refer to *In re Gulack*, 703 F.2d 1381, 217 USPQ 401 (Fed. Cir. 1983). *Id.* We do not subscribe to the appellants' position.

¹ Understandably, consistent with Rule 56, the appellants do not assert that providing an instructional material with devices to be sold is not well known.

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As indicated by *In re Ngai*, 367 F.3d 1336, 1339, 70 USPQ2d 1862, 1864 (Fed. Cir. 2004):

This case, however, is dissimilar from *Gulack*. There the printed matter and the circularity of the band were interrelated, so as to produce a new product useful for "educational and recreational mathematical" purposes. Here, addition of a new set of instructions into a known kit does not interrelate with the kit in the same way as the numbers interrelated with the band. In *Gulack*, the printed matter would not achieve its educational purposes without the band, and the band without the printed matter would similarly be unable to produce the desired result. Here, the printed matter in no way depends on the kit, and the kit does not depend on the printed matter. All that the printed matter does is teach a new use for an existing product. As the *Gulack* court pointed out, "[w]here the printed matter is not functionally related to the substrate, the printed matter will not distinguish the invention from the prior art in terms of patentability." *Id.* If we were to adopt *Ngai's* position, anyone could continue patenting a product indefinitely provided that they add a new instruction sheet to the product. This was not envisioned by *Gulack*.

The claimed printed instructional material, like the printed instructional material in *Ngai*, is not functionally interrelated to the claimed package. Thus, consistent with *Ngai*, we determine that the claimed printed matter would not distinguish the claimed package from the apparatus or package taught by Marino. In other words, we concur with the examiner that Marino would have rendered the subject matter defined by claims 12 through 34 obvious within the meaning of 35 U.S.C. § 103.

The appellants argue that Marino would not have suggested a step of "instructing a user to wipe an animal body surface with a fresh product at least three times" in the method recited in claims 1 and 2. See, e.g., the Brief, pages 6-11. We do not agree.

As indicated *supra*, the appellants have not specifically challenged the examiner's "Official Notice as to the 'well known implements of instructional data associated with devices for sale.'" One of ordinary skill in the art armed with such knowledge would have employed an instructional material to inform the general public, especially children and mentally handicapped individuals, regarding the use of the apparatus or package of the type discussed in Marino. Inasmuch as the number of wipes and the type of wipes (wet and/or dry) are known to be a function of the type and amount of bodily waste and/or soil to be removed from a human body, we determine that the selection of optimum or workable number of wet and/or dry wipes, such as those in the instruction recited in claims 1 and 2, to obtain a desired degree of cleanliness is well within the ambit of one of ordinary skill in the art. See *In re Boesch*, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980) ("[D]iscovery of an optimum value of a result effective variable in a known process is ordinarily within the

skill of the art"); *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955) ("[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation"). This is especially true in this situation since Marino at column 1, lines 59-60, in reference to a device for dispensing moist and dry wipes, intimates that the preference for dry and/or moist tissues is dependent on users.

The appellants appear to argue that the wet/dry wiping recited in claims 2 through 4 imparts unexpected results, thereby rebutting any inference of obviousness. See the Brief, pages 12-15. In support of their argument, the appellants refer to Table A at page 15 of the specification. See the Brief, page 14.

The appellants have the burden of showing that the claimed subject matter imparts unexpected results. *In re Klosak*, 455 F.2d 1077, 1080, 173 USPQ 14, 16 (CCPA 1972); see also *In re Heyna*, 360 F.2d 222, 228, 149 USPQ 692, 697 (CCPA 1966) ("It [is] incumbent upon appellants to submit clear and convincing evidence to support their allegation of unexpected property"). However,

on this record, we are not persuaded that the appellants have demonstrated that the claimed subject matter as a whole imparts unexpected results.

First, it is not enough for the appellants to show that the wet/dry wiping recited in claims 2 through 4 imparts an improvement in the bead (soil) removal relative to a single wiping or dry wiping. The appellants must demonstrate that this improvement is unexpected. *In re Freeman*, 474 F.2d 1318, 1324, 177 USPQ 139, 143 (CCPA 1973); *Klosak*, 455 F.2d at 1080, 173 USPQ at 16. Nevertheless, the appellants have not explained why one of ordinary skill in the art would not reasonably expect to increase the removal of soil or body waste on a body surface by increasing the number of wipings. Additionally, the reason why people wipe as many times as necessary is because it is common knowledge that additional wipes can remove more soil or body waste that are remaining on the body surface after the first wipe. See *In re Bozek*, 416 F.2d 1385, 1390, 163 USPQ 545, 549 (CCPA 1969) (The conclusion of obviousness may be made from "common knowledge and common sense" of the person of ordinary skill in the art); *In re Sovish*, 769 F.2d 738, 743, 226 USPQ 771, 774 (Fed. Cir. 1985) (Skill is presumed on the part of those practicing in the art). Moreover, the appellants have not

explained why the employment of at least one wet wipe is not reasonably expected by one of ordinary skill in the art to improve the removal of soil or body waste on a body surface. At least one wet wipe, unlike dry wiping², would have been expected by one of ordinary skill in the art to loosen and remove soil or body waste on a body surface due to the moisture or water therein just as a wet mop, due to its wetness, is known to loosen and remove soil on a floor surface better than a dry mop. *Bozek*, 416 F.2d at 1390, 163 USPQ at 549; *Sovish*, 769 F.2d at 743, 226 USPQ at 774.

Second, the appellants have not demonstrated that the evidence relied upon is commensurate in scope with claims 2 through 4 on appeal. *In re Grasselli*, 713 F.2d 731, 743, 218 USPQ 769, 778 (Fed. Cir. 1983); *In re Clemens*, 622 F.2d 1029, 1035, 206 USPQ 289, 296 (CCPA 1980). While the evidence relied upon is limited to employing the so-called "KIMWIPES® EX-L-Wipers" having specific composition, structure and moisture content (not identified), claims 2 through 4 are not so limited.

²Any subsequent dry wipe is reasonably expected by one of ordinary skill in the art to absorb moisture and remove any remaining loosened soil.

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The fresh wet and dry products recited in claims 2 through 4 encompass a myriad of wiping materials having compositions, structures and moisture contents patentably and materially different from those of KIMWIPES® EX-L-Wipers. The appellants have not provided any objective evidence to show that the multifarious wet and dry products encompassed by claims 2 through 4 would behave in the same manner as the KIMWIPES® EX-L-Wipers.

Thus, based on the totality of record, including due consideration of the appellants' arguments and evidence, we determine that the preponderance of evidence weighs most heavily in favor of obviousness within the meaning of 35 U.S.C. § 103. Hence, we concur with the examiner that Marino would have also rendered the subject matter defined by claims 1 through 11 obvious within the meaning of 35 U.S.C. § 103.

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CONCLUSION

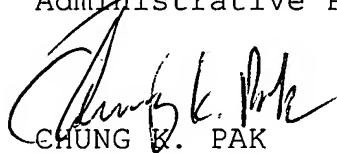
In view of the foregoing, we affirm the examiner's decision rejecting all the claims on appeal under 35 U.S.C. § 103.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED



BRADLEY R. GARRIS
Administrative Patent Judge



CHUNG W. PAK
Administrative Patent Judge



CATHERINE TIMM
Administrative Patent Judge

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